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In the Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

NORMAN J. BOLES AND MARGARET GONZALES, AND ALL OTHERS SIMILARLY SITUATED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

REPLY BRIEF FOR THE APPELLANT

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A. Appellees argue as if the statute at issue here provided: "Mothers of legitimate children shall receive money for the children's benefit, but mothers of illegitimate children shall not." But the statute does not read that way. The benefits are intended to give an option to the mothers; the children receive support indirectly whether the mother chooses to remain at home (thus receiving benefits) or to work (thus earning income). We have elaborated on this point at pages 17-22 of our opening brief. We emphasize here that there is a lack of congruity between the legitimacy of the child in question and the availability of indirect assistance through living with someone who receives mother's benefits.

At least the following categories of legitimate children receive no indirect support from mother's benefits:

1. Children living with their mothers who have remarried after the wage earners' deaths.
2. Children whose mothers have died.
3. Children whose mothers are alive and unmarried, if the children live with relatives, in foster homes, or in the homes of persons who adopted them.
4. Children living with persons with whom the wage earners lived but whom the wage earners did not marry. (For example, suppose that a wage earner and his wife have two legitimate children. The wife dies or is divorced from the wage earner, and the wage earner and his children begin living with a woman whom he does not marry. If the wage earner then dies, the woman with whom he was living at the time of his death will not receive mother's benefits even if she continues to care for the two children.)
5. Children illegitimate at birth but legitimated by operation of the law and living with their unmarried mothers.

On the other hand, at least the following categories of illegitimate children will receive some (indirect) assistance from mother's benefits:

1. Children living with the deceased wage earner's spouse. (This could be similar to example (4) above; if the wage earner first lived with one woman and then married another, all children in the care of the spouse would receive any indirect assistance that mother's benefits offer.)

2. Children whose parents married after their illegitimate birth, but who were not thereby legitimated under state law.
3. Children whose mothers are "deemed" married by operation of 42 U.S.C. 416(h)(1).

The statute simply does not draw its distinctions on the ground of the child's legitimacy. There is a vivid illustration of this. If appellee Norman J. Boles went to live with the wage earner's wife, and if both of the wage earner's legitimate children began living with appellee Gonzales, absolutely nothing would happen to the payment of mother's benefits. Mrs. Boles still would receive mother's benefits, and Gonzales still would receive none. And, of course, all the children would continue to receive their own benefits. It is hard to understand how a statute that operates in this way can be declared invalid on the ground that it discriminates against illegitimate children.[1]

If the statute has any effect at all on illegitimates, the effect is no more than incidental to its purpose of assisting spouses of wage earners. Such an incidental effect is not purposeful discrimination, and it cannot be held unconstitutional. See *Washington* v. *Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-268 (1977).[2]

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[1] A further example is the child drawing benefits on his grandfather's wage record (see 42 U.S.C. 416(e)). Such a child, whether legitimate or not, receives no indirect support from mother's benefits if he is in the care of his mother, but does if he is in the care of his grandmother.

[2] We have discussed the importance of purpose and effect in similar cases at pages 21-32 of the brief for the United States as amicus curiae in *Personnel Administrator of Massachusetts* v. *Feeney*, No. 78-233, argued Feb. 26, 1979. We have furnished a copy of that brief to counsel for appellees.

Indeed, because the statute itself does not make any significant event turn on the legitimacy of the child living with the person who applies for mother's benefits, the injunction entered in this case makes appellees and their class better off because of illegitimacy. Under the order entered by the district court, the legitimate children discussed in categories (1) to (5) above still would not receive any indirect assistance from mother's benefits. If appellee Norman J. Boles were to become legitimate by operation of state law, appellee Gonzales would lose the entitlement to benefits created by the order. If Gonzales were to take the wage earner's legitimate children into her care, and Norman J. Boles were to begin living with the wage earner's spouse, Gonzales would lose her entitlement. Surely there is something strange about a rule of constitutional law that compels Congress to give additional benefits to persons such as Gonzales because the children in their care are illegitimate rather than legitimate.

B. Our opening brief stated (Br. 38 n.30) that it was not likely to be possible to establish with any ease who should be notified under the district court's order. Further inquiry concerning the feasibility of using HEW's computers to identify current recipients of children's benefits who are illegitimate discloses that certain categories of illegitimate children[3] may have been identified as early as 1965 by special coding when awards were entered into the computers. However, a large category of entitled illegitimate children (those entitled under 42 U.S.C. 416(h)(3) because they were acknowledged by the wage earner, living with him, or supported by him at his death) may not have been identified by similar coding prior to 1971. Since obsolete operational manuals detailing the procedures used by the various units

[3] *I.e.*, those entitled to inherit under state law (42 U.S.C. 416(h)(2)).

responsible for the entry of the coding are, in many cases, unavailable, it is extremely difficult to ascertain precisely what information was recorded years ago, and to establish when it began to be recorded. In sum, the point made in note 30 of our brief remains valid: it would not be a simple matter to notify the class members. Although some information concerning the legitimacy of current recipients of children's benefits is available, it is incomplete to a degree that we have not been able to determine. At a minimum, it does not include information for some early recipients processed before the computer system's inception in 1963. We agree with appellees, however, that if this Court should reject our contentions on the merits and also should conclude that class relief was authorized, it would be appropriate for the district court to conduct an evidentiary hearing to determine the extent to which the class can be notified.

For these reasons, as well as those discussed in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

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Solicitor General

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